

- DECISION -

Claimant:
DANA M DIEHL

Decision No.: 5226-BR-12

Date: October 31, 2012

Appeal No.: 1129026

S.S. No.:

Employer:
MONTGOMERY CO GOVERNMENT

L.O. No.: 61

Appellant: Claimant

Issue: Whether the claimant is monetarily eligible for benefits under Section 8-802 of the Labor and Employment Article.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: November 30, 2012

PREAMBLE

The following decision concerns appeals numbers, 1129025, 1129026 and 1129105, inclusive. For clarity, the Board restates the issues in this consolidated decision as follows:

This decision addresses the issue of whether the claimant, as a result of inaccurate reporting of her wages, was overpaid pursuant to *Md. Code Ann., Lab. & Empl. Art., § 8-809(a)*.

This decision also addresses the issue whether the claimant was unemployed within the meaning of *Md. Code Ann., Labor & Emp. Art. §8-801*.

The Board issues this consolidated decision in the instant case for each of the cases cited in the above referenced appeal numbers.

After a review on the record, the Board makes the following findings of facts and conclusions of law. The decision of the hearing examiner is reversed.

FINDINGS OF FACT

The claimant, Dana Diehl, first filed a claim for unemployment insurance benefits, establishing a benefit year effective July 6, 2008 with a weekly benefit amount of \$380.00. The claimant subsequently opened new benefits years on July 6, 2009 and July 6, 2010.

On August 16, 2011, the Agency determined that the claimant was overpaid for the full amount received for the affected weeks, as provided in §8-803, §8-809.

From July, 2008 through July, 2010, the claimant worked two days or less a week as a cashier at the employer's recreational center.

For each of the weeks the claimant filed for benefits, she accurately reported her weekly wages for a part time position.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d); COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

Because benefits are paid on a weekly basis, the Agency has the burden to demonstrate that the claimant was overpaid benefits because of the receipt of wages earned for each week at issue within the meaning of *Md. Code Ann., Lab. & Empl. Art., § 8-809(a)* and *§8-809(b)*. The Board notes that it is the Agency's burden to provide prior notice to the claimant with the specific facts or evidence it relied upon when rendering its determination regarding these issues and must put on a *prima facie* case before the hearing examiner as to these issues. *Md. Code Ann., Lab. & Empl. Art., § 8-809(c)*. The Agency is vested with the investigatory powers to obtain wage information from employers in order to fulfill its duties under *§ 8-809(c)*. *Md. Code Ann., Lab. & Empl. Art., § 8-306*.

The parties, duly noticed of the date, time and place of the hearing, were afforded a full and fair opportunity to present their case before the hearing examiner. Included with each notice to the claimant was information concerning the issue: "Whether the claimant failed to disclose a material fact or made false statements to obtain or increase benefits to which the claimant was not entitled within the meaning of MD. Code Annotated, Labor and Employment Article, Title 8, Sections 809(b), 1301 and 1305." The claimant had previously received benefit determinations specifically setting forth the weeks she had been found to have under-reported her earnings. The Board finds that the claimant was afforded full and complete notice of the issue, and information, upon which the Agency relied in making its decisions.

Md. Code Ann., Labor & Emp. Art. §8-801 provides, in pertinent part:

Unemployment status

- (a) *Required for benefits.* To be eligible for benefits, an individual who files a claim for benefits shall be unemployed.
- (b) *Individuals considered to be unemployed.* An individual is considered to be unemployed in any week during which the individual:
 - (1) does not perform work for which wages are payable; or
 - (2) performs less than full-time work for which wages payable are less than the weekly benefit amount that would be assigned to the individual plus allowances for dependents.

Maryland Code Ann., Lab. & Empl. Art., § 8-809 provides, in pertinent part:

Recovery of benefits

- (a) Redetermination; retroactive award of wages; individual not unemployed. -- The Secretary may recover benefits paid to a claimant if the Secretary finds that the claimant was not entitled to the benefits because:
 - (1) the claimant was not unemployed;
 - (2) the claimant received or retroactively was awarded wages; or
 - (3) due to a redetermination of an original claim by the Secretary, the claimant is disqualified or otherwise ineligible for benefits.
- (b) False statements or representation or failure to disclose material fact. -- If the Secretary finds that a claimant knowingly made a false statement or representation or knowingly failed to disclose a material fact to obtain or increase a benefit or other payment under this title, in addition to disqualification of the claimant, the Secretary may recover from the claimant:

(1) all benefits paid to the claimant for each week for which the false statement or representation was made or for which the claimant failed to disclose a material fact; and

(2) interest of 1.5% per month on the amount accruing from the date that the claimant is notified by the Secretary that the claimant was not entitled to benefits received.

(c) Notice. -- If the Secretary decides to recover benefits from a claimant under subsection (a) or (b) of this section, the Secretary shall notify the claimant of:

(1) the amount to be recovered;

(2) the weeks for which benefits were paid; and

(3) the provision of this title under which the Secretary determined that the claimant was ineligible for benefits. [emphasis added]

Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 413 (1997). "The Court has remained steadfast in reminding agencies that to be admissible in an adjudicatory proceeding, hearsay evidence must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process." *Id.* at 411. See also *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989) ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force.").

One important consideration for a hearing body is the nature of the hearsay evidence. For instance, statements that are sworn under oath, see *Kade*, 80 Md. App. at 726, 566 A.2d at 151, *Eichberg v. Maryland Bd. of Pharmacy*, 50 Md. App. 189, 194, 436 A.2d 525, 529, or made close in time to the incident, see *Richardson v. Perales*, 402 U.S. 389, 402, 28 L. Ed. 2d 842, 91 S. Ct. 1420 (1971), or corroborated, see *Consolidated Edison v. N.L.R.B.*, 305 U.S. 197, 230, 83 L. Ed. 126, 59 S. Ct. 206 (1938) ("mere uncorroborated hearsay or rumor does not constitute substantial evidence"); *Wallace v. District of Columbia Unemployment Compensation Bd.*, 294 A.2d 177, 179 (D.C. 1972), ordinarily is presumed to possess a greater caliber of reliability. Cited in *Travers* 115 Md. App. at 413. Also see *Parham v. Dep't of Labor, Licensing & Regulation*, 985 A.2d 147, 155 (Md. Ct. Spec. App. 2009). Also see *Cook v. National Aquarium in Baltimore*, 1034-BR-91 (the employer offered not a single specific example of the alleged misconduct as observed by either of the employer's witnesses and no documents were introduced relating to any specific instance of misconduct. The employer offered only conclusory statements that the claimant engaged in a certain type of misconduct).

The hearing examiner made no such examination into the reliability of the hearsay evidence in his evaluation of the evidence in this case. As the Court of Appeals has noted, for a reviewing court to perform properly its examination function, an administrative decision must contain factual findings on all the material issues of a case and a clear, explicit statement of the agency's rationale. *Harford County v. Preston*, 322 Md. 493, 505, 588 A.2d 772, 778 (1991). A fully explained administrative decision also fulfills another purpose; it recognizes the "fundamental right of a party to a proceeding before an

administrative agency to be apprised of the facts relied upon by the agency in reaching its decision" *Id.*; also see *Mehrling v. Nationwide Ins. Co.*, 371 Md. 40, 56 (2002); *Fowler v. Motor Vehicle Administration*, 394 Md. 331, 353 (2006); *Crumlish v. Insurance Commissioner*, 70 Md. App. 182, 187 (1987).

In *Kade v. Charles H. Hickey School*, the Court of Special Appeals reversed a decision by an administrative agency for similarly relying on hearsay evidence without establishing the reliability of that evidence. In *Kade*, a school employee appealed his suspension by his employer for disrespectful conduct towards a fellow employee. At the hearing before the administrative agency, the superintendent of the school was the only witness for the employer. The superintendent testified that he was not present on the night of the incident and that all of the information he possessed was based on statements given to him. The Court found the agency's reliance on the hearsay statements submitted by the superintendent to be improper.

Even though the statements were relevant, *there was no indication that this hearsay evidence was reliable, credible or competent.* The statements which were submitted by appellant's co workers are not under oath and do not reflect how they were obtained.... No reason was given as to why the declarants were unavailable.

The Court's rejection of the administrative agency's use of hearsay evidence in *Kade* applies with equal force to the hearing examiner and the Board in this case.

The only statement from the employer is contained in the Agency Fact Finding Report¹. Although the Agency Fact Finding Report is a public document, the statements contained therein are hearsay. While hearsay is admissible in an administrative proceeding, it is usually given less weight than credible, first-hand testimony. Although the hearing examiner may rely on hearsay evidence in making his determination, the hearing examiner must, "first carefully consider[] its reliability and probative value." *Travers v. Baltimore Police Dept.*, 115 Md. App. 395, 413 (1997); also see *Kade v. Charles H. Hickey School*, 80 Md. App. 721, 725 (1989) ("[e]ven though hearsay is admissible, there are limits on its use. The hearsay must be competent and have probative force."). In the instant case, the hearing examiner relied on hearsay evidence as the basis of the decision and improperly weighed the credible evidence in the record.

¹ The Board notes that the original hearing was held on September 12, 2011. Neither the employer nor the Agency appeared at the hearing. The hearing examiner held the entire hearing and closed the hearing. Subsequently, Chief Hearing Examiner Smylie sent a hearing notice seeking to "reopen" the testimony and evidence. A further hearing was set for October 18, 2011. Again, neither the Agency nor the employer appeared. The purpose behind this hearing, as explained to the claimant by the hearing examiner on the October 18, 2011 hearing was to enter the employer's wage information from the Fact Finding Report into the record. The hearing examiner specifically stated: "As I was working on the decision, I was talking to one of my supervisors, she said that I really needed to have some wage information in there. My explanation was that we do not have any wage information because there was no employer, there was no Agency representative and Ms. Diehl doesn't know she really did not get any pay stubs. My supervisor said that you still have to put something into the record. So, that is what we are going to do, we are talking about the Fact Finding Report information, which we have put into the record." Subsequently, the Fact Finding Report was entered into the record as Agency Exhibit 1. It was moved into the record by the hearing examiner to prove the employer's wage information at the "reopened" hearing on October 18, 2011.

In the instant case, neither the Agency nor the employer were present at the Lower Appeals Division hearing. There is no evidence, other than that provided in the Agency Fact Finding Report of the claimant's actual wages reported by the employer. The claimant credibly testified that the wages that she reported were the wages that she earned. There is no other evidence, in the record, to dispute that the wages the claimant reported were incorrect. Therefore, it is impossible to hold the claimant overpaid.

The questions asked by the hearing examiner of the claimant were such that when the Hearing Examiner asked the claimant about the information contained therein, she was unable to verify the information provided by the employer. "if you had to take a guess" or "are these numbers shown accurate". The claimant specifically answered those questions "I do not know", "I have no idea where they got their wage numbers." It is not the claimant's responsibility to prove whether the employer's reported wage information is correct. It is the Agency's responsibility to prove the accurate wage information. The Agency failed to show up at two hearings.

The Board finds that the Agency has failed to present the accurate wage information required to prove by a preponderance of the evidence that the claimant was overpaid benefits.

Further, the Board cannot use those numbers multiplied, divided, added, and subtracted by an Agency representative (or in the instant case, the hearing examiner) to prove the **actual** wages of the claimant and then plugged into a Fact Finding Report to prove a case against the claimant. The Agency is not the "custodian" of those records. The employer is the custodian of the salary records of its employees.

In the instant case, the Board finds that the claimant is unemployed pursuant to the provisions of §8-801. There is no evidence to the contrary. The claimant lost her full-time job in 2008. She worked 2 days a week at a local recreation center. There is no evidence to dispute that the claimant was not unemployed. There is no evidence to show whether the claimant's benefits were higher than those she reported, thus, making her ineligible to receive benefits and overpaid pursuant to §8-809. There has been no evidence presented that the claimant is employed and that the claimant is overpaid.

Finally, one issue that the hearing examiner did not address is the apparent "look back" of the years covered in the benefit determination. Pursuant to §8-809(e)(2), "the Secretary may not make a determination to recover benefits under subsection (a) or (b) of this section later than 3 years after the date that the benefits were paid to the claimant."

In the instant case, the benefit determination was made on August 26, 2011. More than three years from the claimant's 2008 benefit year. Any claims of the Agency that arise prior to the August 26, 2008 are barred by the three year statute of limitations in §8-809(e)(2).

There is insufficient evidence to show that the employer's reporting of the claimant's weekly gross wages is accurate. Because the Agency has no other evidence as to what the claimant's wages actually were, the Board finds that the claimant was not overpaid benefits within *Md. Code Ann., Lab. & Empl. Art., § 8-809(a)*. that the claimant knowingly and intentionally misreported her earnings, the Board finds that the claimant did not violate § 8-1301 and § 8-1305.

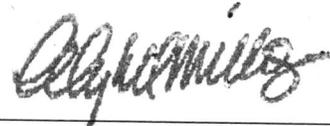
The Board further finds that any benefits paid to the claimant for the weeks in question, cannot be recovered because the Board finds that the claimant was not overpaid pursuant to *Md. Code Ann., Lab. & Empl. Art., § 8-809*.

DECISION

The Board finds, based upon a preponderance of the credible evidence, that the Agency failed to meet its burden of establishing that the claimant was overpaid benefits from week beginning July 12, 2008 through week ending July 23, 2011 within the meaning of § 8-809.

The Board further finds that based upon a preponderance of credible evidence, that the Agency failed to meet its burden that the claimant was not entitled to benefits pursuant to §8-801.

The decisions shall be reversed for the reasons stated herein.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

RD

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UNEMPLOYMENT INSURANCE APPEALS DECISION

DANA M DIEHL

SSN #

Claimant

vs.

MONTGOMERY CO GOVERNMENT

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1129025-1129026
1129105

Appellant: Claimant

Local Office : 61 / COLLEGE PARK
CLAIM CENTER

January 26, 2012

For the Claimant: PRESENT

For the Employer:

For the Agency:

ISSUE(S)

Whether the claimant is in receipt of vacation or holiday pay pursuant to Sec. 1007 of the Labor and Employment Article, Title 8; whether the claimant is monetarily ineligible because the claimant has not earned sufficient wages during the Base Period pursuant to Section 101 & 802 of the Labor and Employment Article, Title 8; whether the claimant is entitled to partial unemployment benefits within the meaning of Section 803; whether the claimant is overpaid within the meaning of Section 8-809a.

PREAMBLE

Appeal Numbers 1129025, 1129026 and 1129105 were consolidated for purposes of hearing and decision. Only this one consolidated decision which addresses the issues in each of the appeals is being issued.

FINDINGS OF FACT

The claimant, Dana Diel, first filed for benefits during the week beginning July 6, 2008 with a weekly benefit amount of \$380.00. The claimant subsequently opened new benefit years on July 6, 2009 and July 6, 2010. Her weekly benefit amounts for the last two benefit years were \$380.00 and \$72.00 respectively.

The claimant was later determined to be eligible for only partial unemployment benefits for a portion of her claim and to be ineligible for any benefits for another period of time, resulting in an overpayment dating back to 2008. The claimant lost her full time job with Bank of America in July 2008 and has been working one or two days per week since then with this employer in a position as a cashier at the Olney Swim Center, a position she has held since 1996.

During these years of unemployment (since 2008) the claimant has continued to seek full time work. However she has been employed on a part-time basis while continuing to look for work in banking, administration and other positions. The agency investigated the claimant's claims going back to the week beginning July 4, 2008 and obtained wage information from the employer. (See Ag. Ex. #1). According to this information, which the claimant does not dispute, she earned less than her weekly benefit amount while working part time for this employer during her first two benefit years. However, during her last benefit year which started in July 2010 she was typically earning more than her weekly benefit amount of \$72.00 per week. (See Ag. Ex. #1) The claimant reported less than her wages earned but less than her weekly benefit amount of \$380.00 for her first two benefit years. (See Ag. Ex. #1) In that report the wages reported by the claimant are consistently less than the wages reported by the employer to the agency. (See Ag. Ex. #1). During the fact finding stage the claimant agreed that the wage information that was reported by the employer was accurate and offered that she was likely reporting net wages and not gross wages. (See Ag. Ex. #1)

The wages reported by the employer and the claimant's declared wages are reported in the chart on the next four pages. (See Ag. Ex. #1) There are some weeks where no wage or benefit amounts are listed and those weeks are noted as "missing". In other weeks, there was no finding that the claimant was overpaid or not unemployed but those weeks were listed in the agency's fact finding report and are listed here as a reference. If no appeal number is listed, this a week which was not included in the Agency's benefit determinations. (See Ag. Ex. #1)

Appeal Number	Week Ending Date	Claimant Earnings	Earnings Reported by Claimant	U.I. Paid	
	7/12/2008	\$93	\$50	Disqualified	
	7/19/2008	\$93	\$52	Disqualified	
	7/26/2008	\$128	\$52	Disqualified	
	8/2/2008	\$129	\$52	Disqualified	
	8/9/2008	\$78	\$52	\$380.00	

	8/16/2008	\$79	\$0	\$380.00	
1129025	8/23/2008	\$105	\$0	\$380.00	
1129025	8/30/2008	\$106	\$50	\$380.00	
1129025	9/6/2008	\$125	\$50	\$380.00	
1129025	9/13/2008	\$125	\$52	\$380.00	
	9/20/2008	\$95	\$52	\$380.00	
	9/27/2008	\$96	\$52	\$380.00	
1129025	10/4/2008	\$127	\$52	\$380.00	
1129025	10/11/2008	\$128	\$52	\$380.00	
1129025	10/18/2008	\$127	\$52	\$380.00	
1129025	10/25/2008	\$128	\$52	\$380.00	
1129025	11/1/2008	\$127	\$52	\$380.00	
1129025	11/8/2008	\$128	\$52	\$380.00	
1129025	11/15/2008	\$127	\$52	\$380.00	
1129025	11/22/2008	\$128	\$50	\$380.00	
1129025	11/29/2008	\$127	\$50	\$380.00	
1129025	12/6/2008	\$128	\$52	\$380.00	
1129025	12/13/2008	\$127	\$52	\$380.00	
1129025	12/20/2008	\$128	\$52	\$380.00	
1129025	12/27/2008	\$127	\$52	\$380.00	
1129025	1/3/2009	\$128	\$52	\$380.00	
1129025	1/10/2009	\$127	\$52	\$380.00	
1129025	1/17/2009	\$128	\$52	\$380.00	
1129025	1/24/2009	\$127	\$52	\$380.00	
1129025	1/31/2009	\$128	\$52	\$380.00	
1129025	2/7/2009	\$127	\$52	\$380.00	
1129025	2/14/2009	\$127	\$52	\$380.00	
	2/21/2009	\$12	\$52	\$380.00	
1129025	2/28/2009	\$128	\$52	\$380 + \$25	
1129025	3/7/2009	\$115	\$52	\$380 + \$25	
1129025	3/14/2009	\$115	\$52	\$380 + \$25	
1129025	3/21/2009	\$115	\$25	\$380 + \$25	
1129025	3/28/2009	\$115	\$52	\$380 + \$25	
1129025	4/4/2009	\$127	\$50	\$380 + \$25	
1129025	4/11/2009	\$128	\$50	\$380 + \$25	
1129025	4/18/2009	\$103	\$50	\$380 + \$25	
1129025	4/25/2009	\$103	\$50	\$380 + \$25	
	5/2/2009	\$85	\$50	\$380 + \$25	
	5/9/2009	\$86	\$50	\$380 + \$25	
1129025	5/16/2009	\$127	\$50	\$380 + \$25	
1129025	5/23/2009	\$128	\$50	\$380 + \$25	
	5/30/2009	\$90	\$50	\$380 + \$25	
	6/6/2009	\$91	\$50	\$380 + \$25	
	6/13/2009	\$54	\$50	\$380 + \$25	

	6/20/2009	\$	\$	\$380 + \$25	Missing
1129026	6/27/2009	\$127	\$45	\$380 + \$25	
1129026	7/4/2009	\$128	\$52	\$380 + \$25	
1129105	7/11/2009	\$127	\$55	\$380 + \$25	
1129105	7/18/2009	\$128	\$50	\$380 + \$25	
1129105	7/25/2009	\$127	\$50	\$380 + \$25	
1129105	8/1/2009	\$128	\$52	\$380 + \$25	
	8/8/2009	\$95	\$52	\$380 + \$25	
	8/15/2009	\$96	\$55	\$380 + \$25	
	8/22/2009	\$	\$	\$380 + \$25	Missing
	8/29/2009	\$	\$	\$380 + \$25	Missing
	9/5/2009	\$100	\$55	\$380 + \$25	
	9/12/2009	\$101	\$62	\$380 + \$25	
1129105	9/19/2009	\$127	\$62	\$380 + \$25	
1129105	9/26/2009	\$128	\$65	\$380 + \$25	
1129105	10/3/2009	\$127	\$65	\$380 + \$25	
1129105	10/10/2009	\$128	\$65	\$380 + \$25	
1129105	10/17/2009	\$127	\$65	\$380 + \$25	
1129105	10/24/2009	\$128	\$60	\$380 + \$25	
1129105	10/31/2009	\$127	\$60	\$380 + \$25	
1129105	11/7/2009	\$128	\$60	\$380 + \$25	
1129105	11/14/2009	\$127	\$60	\$380 + \$25	
1129105	11/21/2009	\$128	\$60	\$380 + \$25	
1129105	11/28/2009	\$127	\$60	\$380 + \$25	
1129105	12/5/2009	\$128	\$60	\$380 + \$25	
	12/12/2009	\$90	\$60	\$380 + \$25	
	12/19/2009	\$91	\$60	\$380 + \$25	
	12/26/2009	\$100	\$60	\$380 + \$25	
	1/2/2010	\$101	\$60	\$380 + \$25	
1129105	1/9/2010	\$127	\$60	\$380 + \$25	
1129105	1/16/2010	\$128	\$60	\$380 + \$25	
1129105	1/23/2010	\$127	\$65	\$380 + \$25	
	1/30/2010	\$128	\$65	\$380 + \$25	
	2/6/2010	\$	\$65	\$380 + \$25	Missing
1129105	2/13/2010	\$128	\$65	\$380 + \$25	
1129105	2/20/2010	\$127	\$65	\$380 + \$25	
1129105	2/27/2010	\$128	\$65	\$380 + \$25	
1129105	3/6/2010	\$90	\$65	\$380 + \$25	
1129105	3/13/2010	\$91	\$65	\$380 + \$25	
1129105	3/20/2010	\$127	\$65	\$380 + \$25	
1129105	3/27/2010	\$128	\$65	\$380 + \$25	
1129105	4/3/2010	\$100	\$65	\$380 + \$25	
1129105	4/10/2010	\$101	\$65	\$380 + \$25	
1129105	4/17/2010	\$127	\$65	\$380 + \$25	

1129105	4/24/2010	\$128	\$65	\$380 + \$25	
1129105	5/1/2010	\$127	\$65	\$380 + \$25	
1129105	5/8/2010	\$128	\$65	\$380 + \$25	
1129105	5/15/2010	\$127	\$65	\$380 + \$25	
1129105	5/22/2010	\$128	\$65	\$380 + \$25	
1129105	5/29/2010	\$127	\$65	\$380 + \$25	
1129105	6/5/2010	\$128	\$65	\$380 + \$25	
	6/12/2010	\$90	\$65	\$380 + \$25	
	6/19/2010	\$91	\$65	\$380 + \$25	
	6/26/2010	\$100	\$65	\$380 + \$25	
	7/3/2010	\$101	\$65	\$380 + \$25	
	7/10/2010	\$125	\$98	Over Week	Benefit \$
	7/17/2010	\$125	\$76	\$80.00	
	7/24/2010	\$76	\$52	\$80.00	
	7/31/2010	\$76	\$73	\$80.00	
	8/7/2010	\$78	\$46	\$80.00	
	8/14/2010	\$79	\$71	\$80.00	
	8/21/2010	\$	\$	\$80.00	Missing
	8/28/2010	\$	\$	\$80.00	Missing
1129125	9/4/2010	\$98	\$0	\$80.00	
1129125	9/11/2010	\$98	\$66	\$80.00	
1129125	9/18/2010	\$105	\$75	\$80.00	
1129125	9/25/2010	\$106	\$77	\$80.00	
	10/2/2010	\$78	\$0	\$80.00	
	10/9/2010	\$78	\$78	\$80.00	
1129126	10/16/2010	\$98	\$66	\$80.00	
1129126	10/23/2010	\$98	\$52	\$80.00	
1129126	10/30/2010	\$110	\$76	\$80.00	
1129126	11/6/2010	\$111	\$76	\$80.00	
1129126	11/13/2010	\$122	\$54	\$80.00	
1129126	11/20/2010	\$123	\$76	\$80.00	
1129126	11/27/2010	\$108	\$58	\$80.00	
1129126	12/4/2010	\$108	\$58	\$80.00	
1129126	12/11/2010	\$108	\$69	\$80.00	
1129126	12/18/2010	\$108	\$54	\$80.00	
1129126	12/25/2010	\$85	\$63	\$80.00	
1129126	1/1/2011	\$86	\$66	\$80.00	
1129126	1/8/2011	\$142	\$75	\$80.00	
1129126	1/15/2011	\$142	\$28	\$80.00	
1129126	1/22/2011	\$108	\$51	\$80.00	
1129126	1/29/2011	\$108	\$46	\$80.00	
1129126	2/5/2011	\$98	\$51	\$80.00	
1129126	2/12/2011	\$98	\$68	\$80.00	
1129126	2/19/2011	\$108	\$48	\$80.00	

1129126	2/26/2011	\$108	\$67	\$80.00	
1129126	3/5/2011	\$98	\$48	\$80.00	
1129126	3/12/2011	\$98	\$69	\$80.00	
1129126	3/19/2011	\$98	\$42	\$80.00	
1129126	3/26/2011	\$98	\$68	\$80.00	
1129126	4/2/2011	\$98	\$52	\$80.00	
1129126	4/9/2011	\$98	\$64	\$80.00	
1129126	4/16/2011	\$98	\$48	\$80.00	
1129126	4/23/2011	\$98	\$67	\$80.00	
	4/30/2011	\$71	\$28	\$80.00	
	5/7/2011	\$72	\$56	\$80.00	
	5/14/2011	\$98	\$48	\$80.00	
	5/21/2011	\$98	\$64	\$80.00	
1129127	5/28/2011	\$127	\$52	\$80.00	
1129127	6/4/2011	\$128	\$68	\$80.00	
1129127	6/11/2011	\$125	\$48	\$80.00	
1129127	6/18/2011	\$125	\$73	\$80.00	
1129127	6/25/2011	\$81	\$49	\$80.00	
1129127	7/2/2011	\$81	\$32	\$80.00	
	7/9/2011	\$57	\$28	Pending	
	7/16/2011	\$	\$		Missing
	7/23/2011	\$57	\$72	Pending	

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-801(a) states that in order to be eligible for benefits, an individual who files a claim for benefits shall be unemployed.

Section 8-801(b) states that an individual is considered to be unemployed in any week during which the individual: (1) does not perform work for which wages are payable; or (2) performs less than full-time work for which wages payable are less than the claimant's weekly benefit amount plus allowances for dependents.

COMAR 09.32.02.10 provides for payment of partial benefits to a claimant who performs service for wages but earns less in gross wages than his weekly benefit amount. Md. Code Ann., Labor & Emp. Article, Section 8-803(d) provides a method for calculating the amount of partial benefits a claimant is entitled to receive.

It states that a claimant eligible for partial benefits shall be paid a weekly benefits amount that is computed by:

- (i) determining the claimant's weekly benefit amount under this section;
- (ii) adding any allowance for a dependent to which the claimant is entitled under Section 8-804 of this subtitle; and subtracting

- (iii) any wages exceeding \$100 payable to the claimant for the week.

Md. Code Ann., Labor & Emp. Article, Section 8-809(a) provides that "The Secretary may recover benefits paid to a claimant if the Secretary finds that the claimant was not entitled to the benefits because:

- (1) the claimant was not unemployed;
- (2) the claimant received or retroactively was awarded wages; or
- (3) due to a redetermination of an original claim by the Secretary, the claimant is disqualified or otherwise ineligible for benefits."

EVALUATION OF EVIDENCE

In these appeals, this Hearing Examiner is first charged with determining whether the claimant was unemployed within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-801. In this case the claimant did demonstrate that she performed work for wages on a part-time basis. During her first two benefit years, her earnings for this work was less than her weekly benefit amount. Thus, from July 6, 2008 through July 3, 2010, the claimant was unemployed and entitled to partial benefits. She was overpaid benefits during those years because she reported an amount less than her earnings likely due to her reporting of her net versus her gross earnings. Thus she was overpaid the difference between what she was paid in unemployment insurance benefits and what she should have received. Those benefits may be recovered pursuant to Md. Code Ann., Labor & Emp. Article, Section 8-809(a).

However, commencing with the third benefit year in July 2010, the claimant was not unemployed for most of the weeks in question. In July 2010 the claimant's weekly benefit amount was reduced to \$80.00. Although she continued to work the same limited hours, during many of the weeks she earned more than her weekly benefit amount. During any week that earned more than \$80.00 she was not entitled to any unemployment benefits because she was no longer unemployed within the meaning of Title 8, Section 801. For weeks where she earned less than \$80.00 she is entitled to partial benefits which are computed in accordance in with the formula contained in the Conclusions of Law above. Any benefits she received but to which she was not entitled may be recovered pursuant to Md. Code Ann., Labor & Emp. Article, Section 8-809(a).

DECISION

IT IS HELD THAT the claimant is in receipt of benefits to which the claimant is not entitled and which must be repaid under the Maryland Unemployment Insurance Law, Section 8-809(a). The claimant is entitled to partial benefits within the meaning of Title 8, Sections 801 and 803 for the period from July 6, 2008 through July 3, 2010. The claimant is entitled to partial benefits during the weeks where she earned an amount less than her weekly benefit amount for the period from July 4, 2010 through July 23, 2011. The Claim Center shall calculate the amount of any overpayment associated with this decision. For purposes of determining the claimant's eligibility for benefits and the amount of any overpayment, the claimant's wages shall be those listed in the "Claimant's Wages" column of the chart contained in the Findings of Fact above.

The decision of the claims specialist in Appeal Numbers 1129025, 1129026, and 1129105 are affirmed.



P G Randazzo, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by February 10, 2012. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street

Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : October 18,2011
CH/Specialist ID: WHG2M
Seq No: 004
Copies mailed on January 26, 2012 to:
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